UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 99-4187

NATIONAL LABOR RELATIONS BOARD

Petitioner

V.

ALUMINUM CASTING & ENGINEERING COMPANY, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The statement of subject matter and appellate jurisdiction of Aluminum Casting & Engineering Company, Inc. ("the Company") is correct, but is not complete. This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Board order issued against the Company on

April 9, 1999. The Board's Decision and Order are reported at 328 NLRB No. 2. $(D\&O~1-21.)^1$

The Board had jurisdiction over this case under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. No commerce issue is presented here. The Board's order is final under Section 10(e) of the Act (29 U.S.C. § 160(e)).

The Court has jurisdiction over this case under Section 10(e) of the Act (29 U.S.C. § 160(e)), the unfair labor practices having occurred in Milwaukee, Wisconsin. The Board filed its application for enforcement on December 13, 1999. The application was timely filed as the Act places no time limit on such filings.

"D&O" and "ALJD" refer to the Decision and Order of the Board and the recommended decision and order of the administrative law judge, respectively, which are contained in the unpaginated Short Appendix appended to the Company's brief. "Tr" refers to the hearing transcript. "GCX" and "CX" refer to the General Counsel's and the Company's respective exhibits introduced at the hearing, which are contained in the separate, unpaginated Appendix filed with the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES

- I. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act by maintaining an unlawful no-solicitation rule, telling employees to report "pressure" to sign authorization cards, reimbursing employees for vehicle damage attributed to the Union, vowing to do everything possible to remain union-free, failing to announce a wage increase in January 1995, telling employees in February 1995 that there would be no wage increase, and blaming the Union for the loss of the wage increase.
- II. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by failing to continue its practice of conducting annual wage surveys and, based thereon, of granting annual wage increases, in 1995 and each year thereafter, because employees voted for the Union.
- III. Whether the Board acted reasonably within its broad remedial discretion in ordering the Company to make employees whole for annual wage increases they would have received in 1995 and each year thereafter.

STATEMENT OF THE CASE

Acting on a series of unfair labor practice charges filed by the United Electrical, Radio & Machine Workers of America ("the Union"), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by, among other things, maintaining an overly broad no-solicitation rule; telling employees to report any "pressure" to sign union authorization cards; reimbursing employees for damage to their cars if the employees attributed the damage to the Union; declaring in its employee handbook the Company's intention "to do everything possible" to remain unionfree; and failing to announce a wage increase in January 1995, telling employees in February 1995 that there would be no wage increase, and blaming the Union for the loss of the wage increase. The complaint further alleged that the Company violated Sections 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by failing in 1995 to continue its annual practice of reviewing wages and, based thereon, of granting necessary across-the-board wage increases, to discourage employee support for the Union. (GCX 1(r), 1(y).)

Following a hearing, an administrative law judge found that the Company violated the Act substantially as alleged in the complaint.² On April 9, 1999, the Board (Members Liebman and Hurtgen, and Member Brame, concurring in part and dissenting in part) issued its Decision and Order affirming the administrative law judge's rulings, findings, and all but one of his legal conclusions.³ This case is now before the Court on the Board's application to enforce its order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company, located in Milwaukee, Wisconsin, manufactures aluminum castings for the automobile industry. At all material times, James VanderMale, the Company's Director of Labor Relations, was in charge of its labor-relations policies. (ALJD 6; Tr 24-25.) During 1994, the Company employed about 400 production and maintenance workers. (ALJD 6; Tr 26-27.) In about July 1994, the Union began an organizing drive among those employees. (ALJD 6; Tr 28, 382.)

² The judge dismissed those sections of the complaint that alleged additional violations of the Act. The Union does not contest these rulings.

³ The Board (Members Hurtgen and Brame, and Member Liebman dissenting) disagreed, (D&O 3), with the judge's conclusion that the Company made an unlawful remark about an employee's prounion button. The Union does not contest this ruling.

B. The Company Begins Its Antiunion Campaign and Maintains Its Intention to Do Everything Possible to Stay Union-Free; The Company Prohibits Soliciting on "Duty" Time

The Company learned of the organizing drive in mid to late July, (ALJD 6; Tr 28), and, from the outset, made clear to its managers, supervisors, and employees that the Company was "strongly" opposed to the Union. (ALJD 6; Tr 29-30.) Thus, the Company commenced a "vigorous," (Tr 29), campaign against the Union, (ALJD 6; Tr 28, 382). The campaign involved numerous captive audience meetings, antiunion literature, and one-on-one meetings between supervisors and employees. (ALJD 6; Tr 37-41.) During the campaign, the Company openly and repeatedly characterized the Union as a "despicable union," (ALJD 6; GCX 6(a)), a "bottom feeder," (ALJD 6; Tr 30, GCX 6(a)), and as the "worst of the worst," (ALJD 6; Tr 30).

Throughout the union organizing drive, the Company maintained in its employee handbook, under a section entitled, "What About A Union," the following statement: "It is our intention to do everything possible to maintain our Company's union-free status for the benefit of both our employees and ACE/CO." (D&O 2, ALJD 9; Tr 32, 34-35, GCX 2, 3.) The Company republished that statement in the February 1995 edition of its employee handbook. (Tr 35, GCX 35.)

The Company also maintains, and distributes to all employees, "Rules of Conduct." (D&O 2, ALJD 10; Tr 579-580.)

Rule of Conduct 11 prohibits "[s]oliciting or selling on company premises except when all concerned are relieved from duty."

(D&O 2, ALJD 10; Tr 579-581.) The Company maintained this rule throughout the union campaign. (Tr 581.)

C. The Union Wins the Representation Election; The Company Reimburses Employees for Damage to Their Vehicles if They Attribute the Damage to the Union; The Company Asks Employees to Report Pressure by the Union to Sign Authorization Cards

On January 5 and 6, 1995, the Board conducted a representation election in a unit of the Company's production and maintenance employees, which the Union won. (ALJD 6; Tally of Ballots.) Following the election, the Company, in the course of taking statements from antiunion employees in support of its election objections, (Tr 121, 468-469), learned of and offered to reimburse four employees for damage to their vehicles that occurred on or near company property, (D&O 1, ALJD 12; Tr 118-119). The employees attributed the vehicle damage to the Union, (D&O 1, ALJD 12; Tr 468-469), and the Company concluded that the Union was responsible, even though there was no evidence to support that conclusion, (D&O 1, ALJD 12; Tr 126). The Company never announced to other employees the availability of such reimbursements. (ALJD 12; Tr 122, 123.) Previously, the

Company had only reimbursed employees for vehicle damage caused by the Company. (D&O 1, ALJD 12; Tr 128-129.)

Given the Company's filing of election objections, the Union continued to attempt to obtain authorization cards from employees after the January 5-6, 1995, election. (ALJD 12.) On March 13, the Company distributed a notice, asking employees to tell their supervisor if "anyone puts you under any pressure to sign a union card or threatens you in any way because you won't sign a card." (D&O 1, ALJD 11; Tr 112, GCX 14(b).)

D. The Company Fails to Announce a Periodic Wage Raise, Advises Employees That There Will Be No Increase, and Blames the Union for the Loss of the Wage Increase

In five of six consecutive years, from 1989 through 1994, the Company announced and implemented across-the-board wage increases in January or February. (D&O 1, ALJD 7; Tr 47, 49-53, 64, GCX 5(a)-(e), GCX 8(a).) To determine the amount of these "periodic wage adjustments," (GCX 8(a)), the Company examined increases in the cost-of-living index over the preceding 12 months, determined if its competitors planned to raise wages, and consulted publications distributed by the Management Resources Association, (D&O 1, ALJD 7; Tr 50, 64, GCX 6(a), GCX 7). As a result of this process, the Company announced and implemented across-the-board wage increases in 1989, 1990, 1992, 1993, and 1994; there was no increase in 1991 because the

Company's wage review disclosed that an increase was not economically warranted. (ALJD 7; Tr 47, 51-52, GCX 5(a)-5(e).)

The Company explained to new employees its practice of implementing annual across-the-board wage increases in a series of meetings held in October 1994. (ALJD 7; Tr 60-61, GCX 6(a).) The Company made clear that "[a]n announcement is usually made in January of each year." (ALJD 7; Tr 61, GCX 6(a).) The Company also told employees, though, "[t]hat's what happens each year--when there is no union." (ALJD 7; Tr 61, GCX 6(a).)

Shortly thereafter, the Company began its annual assessment of cost-of-living increases, its competitors' wages, and industry publications, (ALJD 7; Tr 53, 762), and so advised its employees, (ALJD 7; Tr 64). In a meeting on December 7, 1994, the Company reminded employees that the Company's "past and present practice is to conduct the [wage] survey in the Fall, to announce the increase in late December or early January, and to put the increase into effect in February." (D&O 1, ALJD 7-8; Tr 70, 72-73; GCX 6(c).) Again, however, the Company added a caveat, stating:

Obviously, if a union comes in, wages would be subject to the process of bargaining and wage programs could not be changed (up or down) during that process. The law does not provide time guidelines as to how long negotiations could last. That could take months or years. (D&O 1, ALJD 8; GCX 6(c).)

Following the Union's victory in the January 5-6, 1995, election, the Company failed to announce an annual across-the-board wage increase for 1995. (ALJD 8; CX 22.) Rather, on February 6, 4 it announced in a leaflet to employees that, although its practice had been to "survey the marketplace each December," "announce the changes in January, and make them effective in February," it had decided to postpone any changes, "at least until the election was certified." (D&O 1, ALJD 8; Tr 89, GCX 9.) 5

On March 27, 1995, the Company told employees, in a leaflet entitled, "When will it end?" (D&O 1; Tr 90, GCX 10), that employees had been wondering, "what happened to the union's big promise of wage increases," (D&O 1; GCX 10), and asking, "when this mess will finally end," (D&O 1; GCX 10). The leaflet addressed these questions as follows:

The fact is we are a long way from the end. The union has denied the obvious errors in the election and has insisted on a long Hearing. We are probably months away from a final decision. (D&O 1; GCX 10.)

The leaflet concluded: "Tired of all the mess? There is only one solution. Say NO to the union, don't sign their cards, and vote NO when you get the chance." (D&O 1; GCX 10.)

 $^{^{4}}$ The administrative law judge incorrectly stated, (ALJD 8), that the leaflet was dated February 5.

 $^{^{5}}$ The Board subsequently set aside the election based on two objections filed by the Company.

Finally, in a June 27, 1995, leaflet to employees, the Company stated:

Remember the big promises of \$1.00 an hour increases, new benefits, and quick successes?

Since then, there have been \underline{no} increases in wages except for those under plans started by ACE/CO before the Union.

* * *

In the one-year period before the UE stuck its nose in, you had a wage increase, a new pay for knowledge program, and benefit changes. Ask yourself-weren't we all a lot better off? (D&O 1; Tr 90-91, GCX 11.)

The Company never announced or implemented an across-the-board wage increase in 1995 or any year thereafter. (ALJD 8; Tr 767.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Liebman and Hurtgen, and Member Brame, concurring in part and dissenting in part) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting solicitation "except when all concerned are relieved from duty"; reimbursing employees for vehicle damage if they attributed the damage to the Union; directing employees to report any "pressure" to sign union authorization cards; declaring in its handbook its intention "to

do everything possible" to remain union-free; and failing to announce a wage increase in January 1995, telling employees in February 1995 that there would be no wage increase, and blaming the Union in June 1995 for the loss of the wage increase. (D&O 1-3.) The Board further found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §§ 158(a)(3) and (1)) by discontinuing its practice of annually reviewing wages and, based thereon, implementing necessary increases in 1995 and each year thereafter because employees voted for the Union. (D&O 1-2.)

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires the Company to rescind its overly broad no-solicitation rule, to rescind the unlawful statement of its intention to remain nonunion, and to make whole all employees who were not granted across-the-board wage increases in 1995 and each year thereafter. The Board's order also requires the Company to post a remedial notice. (D&O 3-4.)

SUMMARY OF ARGUMENT

Substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act by prohibiting solicitation "except when all concerned are relieved from duty"; reimbursing employees for vehicle damage if they attributed the damage to the Union; directing employees to report any "pressure" to sign union authorization cards; declaring in its handbook its intention "to do everything possible" to remain union-free; and failing to announce a wage increase in January 1995, telling employees in February 1995 that there would be no wage increase, and blaming the Union in June 1995 for the loss of the wage increase. The Company's challenges to these findings lack merit.

The Company's no-solicitation rule is overly broad because it can reasonably be understood to prohibit solicitation during employees' own time during their shifts, such as lunch and break periods. The Board's finding that the Company unlawfully reimbursed antiunion employees for vehicle damage is more than justified by the evidence that this benefit was offered only to those employees who gave statements in support of the Company's election objections. The Company's request that employees report any "pressure" to sign union authorization cards was unlawful because it encouraged employees to report the identity of union card solicitors and, as a result, discouraged such

activities. The Company's statement that it intended "to do everything possible to remain union-free" was unlawful because that statement can reasonably be understood as a threat to resort to unlawful means, if necessary, to prevent employees from selecting union representation. The record also fully supports the Board's findings that the Company violated Section 8(a)(1) of the Act by failing to announce a wage increase in January 1995, telling employees in February 1995 that there would be no wage increase, and blaming the Union for the loss of the wage increase.

Substantial evidence also supports the Board's further finding that the Company violated Section 8(a)(3) and (1) of the Act by discontinuing its practice of annually reviewing wages and, based thereon, of granting necessary across-the-board increases, because employees voted for the Union. The evidence shows that the Company had an established practice of reviewing wages and granting necessary increases, and that the Company ended this practice because employees voted for the Union.

Finally, in remedying this violation, the Board acted reasonably within its broad remedial discretion in ordering the Company to make whole all employees who would have received across-the-board wage increases in 1995 and each year thereafter.

ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING AN UNLAWFUL NO-SOLICITATION RULE, TELLING EMPLOYEES TO REPORT "PRESSURE" TO SIGN AUTHORIZATION CARDS, REIMBURSING EMPLOYEES FOR VEHICLE DAMAGE ATTIRBUTED TO THE UNION, VOWING TO DO EVERYTHING POSSIBLE TO REMAIN UNION-FREE, FAILING TO ANNOUNCE A WAGE INCREASE IN JANUARY 1995, TELLING EMPLOYEES IN FEBRUARY 1995 THAT THERE WOULD BE NO INCREASE, AND BLAMING THE UNION IN JUNE 1995 FOR THE LOSS OF THE WAGE INCREASE
- A. Applicable Principles and Standard of Review
 Section 7 of the Act (29 U.S.C. § 157) guarantees employees
 "the right to self-organization, [and] to form, join, or assist
 labor organizations" Section 8(a)(1) of the Act (29
 U.S.C. § 158(a)(1)) implements this guarantee by making it an
 unfair labor practice for an employer "to interfere with,
 restrain, or coerce employees in the exercise of the rights
 guaranteed in section 7." See NLRB v. Q-1 Motor Express, Inc.,
 25 F.3d 473, 477 (7th Cir. 1994).

The test for determining whether an employer has violated Section 8(a)(1) of the Act is not whether an employer intended to interfere with its employees' union activities, or whether interference or coercion actually occurred. Rather, "it is whether the employer's actions 'reasonably tended to interfere with or coerce employees in the exercise of their protected rights.'" Carry Companies of Illinois, Inc. v. NLRB, 30 F.3d 922, 934 (7th Cir. 1994) (quoting Weather Shield Mfg., Inc. v.

NLRB, 890 F.2d 52, 56 (7th Cir. 1989)). The critical inquiry, then, is what an employee reasonably could have inferred from the employer's statements or actions. See NLRB v. Shelby

Memorial Hospital Ass'n, 1 F.3d 550, 559-560 (7th Cir. 1993).

In applying this standard, the Board properly considers "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." NLRB v. Gissel Packing Co., 395

U.S. 575, 617 (1969). Accord NLRB v. Overnite Transportation

Co., 938 F.2d 815, 819 n.6 (7th Cir. 1991).

The Court's review of the Board's order "is sharply limited." Livingston Pipe & Tube, Inc. v. NLRB, 987 F.2d 422, 426 (7th Cir. 1993). The Court must uphold the Board's order if its factual findings are supported by substantial evidence on the record as a whole and its legal conclusions have a reasonable basis in the law. Van Vlerah Mechanical, Inc. v. NLRB, 130 F.3d 1258, 1262 (7th Cir. 1997). The Board's findings, if supported by substantial evidence, should be affirmed even if the Court might have reached a different conclusion had the matter been before it de novo. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Central Transport, Inc. v. NLRB, 997 F.2d 1180, 1190 (7th Cir. 1993).

B. Substantial Evidence Supports the Board's Finding that the Company Maintained an Unlawful No-Solicitation Rule

Substantial evidence supports the Board's finding, (D&O 2-3, ALJD 10), that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining a rule prohibiting "[s]oliciting or selling on company premises except when all concerned are relieved from duty." (D&O 2; CX 11.) Implicit in the Section 7 right to self-organization, to form, join, or assist labor organizations and to engage in protected concerted activities is the right of employees to inform other employees of union or concerted activity and to solicit their interest. See NLRB v. Challenge-Cook Bros. Of Ohio, Inc., 374 F.2d 147, 153 (6th Cir. 1967). Accord Helton v. NLRB, 656 F.2d 883, 885, 886 (D.C. Cir. 1981). The Supreme Court has recognized that the workplace is a "particularly appropriate place" for employees to engage in such activity. Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (1978). Accord Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801 n.6 (1945).

The right of employees to solicit in the workplace, of course, is not limitless. The Board has long recognized that "[w]orking time is for work." Peyton Packing Co., 49 NLRB 828, 843 (1945). Cognizant of that principle, the Board has explained that the inquiry is whether a no-solicitation rule "clearly convey[s]" to employees that it applies only when they

are performing actual job duties, not during their own time, such as lunch and break periods. Laidlaw Transit, Inc., 315

NLRB 79, 82 (1994). Accord Our Way, Inc., 268 NLRB 394, 394-395 (1983). Applying this test, the Board has held that rules prohibiting solicitation during "working time" are valid because that terminology is easily understood as barring solicitation when employees are performing actual job duties, but permitting it during nonworking time. See Our Way, 268 NLRB at 394-395;

Essex Int'1, 211 NLRB 749, 750 (1974).

In contrast, as the Board explained here, (D&O 2-3), "duty" time rules are presumptively invalid "because they 'reasonably could be understood to mean that [employees] were prohibited from [engaging in] protected concerted activity from the time that they came on duty or began their shift, including during breaks or meal periods.'" (D&O 2) (quoting Central Security Services, Inc., 315 NLRB 239, 243 (1994) (rule prohibiting reading of any literature while "on duty" was invalid)). Accord Ebon Research Systems, 290 NLRB 751, 751 n.3 (1988) (rule against solicitation during "duty time" and "duty hours" was unlawful where it failed to "state with sufficient clarity that employees may solicit on their own time"); NLRB v. Chicago Metallic Corp., 794 F.2d 527, 533 (9th Cir. 1986) (rules barring solicitation while on "company time" are invalid). As the Board

concluded, the Company's "'duty' time rule [is] unlawful conduct under [this] established Board precedent." (D&O 3.)

The Board, (ALJD 10), reasonably rejected the Company's contention (Br 34) that its "duty" time rule was clarified by the posting of a no-solicitation policy in the company lunchroom, which prohibited solicitation during "working time." (Tr 670-671, CX 24, 25.) An employer may show that a presumptively unlawful no-solicitation rule was communicated or applied "in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." Essex Int'l, 211 NLRB 749, 750 (1974). As the Board found, (ALJD 10), however, this was not accomplished by the Company's separate posting of a "working time" rule, which neither mentioned nor clarified the Company's unlawful "duty" time rule. See, e.g., Publishers Printing Co., 317 NLRB 933, 934 (1995) (where unlawful rule in handbook against solicitation "on the job" appeared 27 pages apart from, and used different language than, a second provision disallowing solicitation during "working time," there was no "reasonable basis to believe that employees would conclude that these two handbook sections must or should be read together or that 'on the job' and 'working time' must or should be considered synonymous"), enforced mem., 106 F.3d 401 (6th Cir. 1996).

C. The Company Unlawfully Told Employees to Report "Pressure" to Sign Authorization Cards

Substantial evidence supports the Board's finding, (D&O 2), that the Company violated Section 8(a)(1) of the Act by asking employees to inform the Company if anyone "puts you under any pressure to sign a union card." (D&O 2, ALJD 12; GCX 14(b).) 6 As the Board explained, (ALJD 12), it has consistently held that requests to report "pressure" are unlawful because they have "the potential dual effect of encouraging employees to report to [the employer] the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities." J.H. Block & Co., 247 NLRB 262, 262 (1980). Accord Publishers Printing Co., 317 NLRB 933, 934 (1995) (employer unlawfully told employees to report "any sort of pressure to join" a union), enforced mem., 106 F.3d 401 (6th Cir. 1996); Sunnyland Packing Co., 227 NLRB 590, 594-595 (1976), enforced, 557 F.2d 1157 (5th Cir. 1977); C.O.W. Indus., Inc., 276 NLRB 960, 961 (1985) (report "any sort of pressure to join" a union).

⁶ As noted in the Statement of Facts, the Company's request to report pressure also requested employees to inform the Company if anyone "threatens you in any way because you won't sign a card." (D&O 2, ALJD 12; GCX 14(b).) The Board's finding of a violation, however, was limited to the request to report "pressure."

There is no merit in the Company's contention (Br 38-39) that it was merely attempting to impress upon its employees the significance of an authorization card or to address coercion of its employees. An employer's intent or purpose is irrelevant under Section 8(a)(1) of the Act. See Carry Companies of Illinois, Inc. v. NLRB, 30 F.3d 922, 934 (7th Cir. 1994) (test under Section 8(a)(1) is not whether an employer intended to interfere with its employees' union activities, but rather "whether the employer's actions 'reasonably tended to interfere with or coerce employees in the exercise of their protected rights'") (citations omitted). Moreover, as noted above, the Board, (D&O 2), did not rely on that part of the Company's statement that encouraged employees to report threats.

D. The Company Unlawfully Reimbursed Employees for Vehicle Damage Attributed to the Union

Substantial evidence supports the Board's finding, (D&O 2, ALJD 12), that the Company violated Section 8(a)(1) of the Act by reimbursing employees for vehicle damage attributed to the Union. As the Board explained, (ALJD 12), it is unlawful for an employer to offer or grant benefits to employees for opposing a union or engaging in antiunion behavior. See McClain of Georgia, Inc., 322 NLRB 367, 378 (1996) (employer unlawfully promised \$1 raise to employee if he was "on [employer's] side"); John Ascuaga's Nugget, 298 NLRB 524, 556 (1990) (employer

unlawfully offered to pay employees for engaging in antiunion picketing), enforced in part, 968 F.2d 991 (9th Cir. 1992).

As the Board found, (D&O 2, ALJD 12), the Company had a practice of reimbursing employees for vehicle damage that was caused, or could have been caused, by the Company, (D&O 2, ALJD 12; Tr 127-129). However, as the Board found, (D&O 2, ALJD 12), in this instance the Company reimbursed four employees for vehicle damage they attributed to the Union. Moreover, as the Board emphasized, (D&O 2, ALJD 12), the Company did so even though it had no reason to believe that the Union was responsible for the damage, (D&O 2; Tr 126-127, 469). As the Board concluded, the "effect of the [Company's] conduct was to communicate a message to its employees that it was willing to act in a disparate manner and contrary to past practice if they would accuse union supporters (and no others) of being responsible for the damage to their vehicles." (D&O 2.)

There is no merit in the Company's argument (Br 35-38) that the Board's finding lacks support in the record. The Company asserts (Br 36) that "all employees who came forward and complained of damage to vehicles on company property were reimbursed." But, in fact, the Company only offered the reimbursements in the course of taking statements from employees who "came forward" to give statements in support of the Company's election objections. (Tr 121-122, 468-469.) Indeed,

Director of Labor Relations VanderMale conceded, (ALJD 12; Tr 122, 123), that the Company never announced to other employees the availability of such reimbursements.

The Company next argues (Br 37) that the Board erred in finding, (D&O 2, ALJD 12), that the Company's past practice was limited to reimbursing employees for damage that was caused, or could have been caused, by the Company. According to the Company, (Br 37), it reimbursed any employee whose vehicle was damaged on company property. On the contrary, in describing other instances in which the Company had reimbursed employees for damage to their vehicles, VanderMale made clear that the reimbursements were made because the damage had been caused, or the Company concluded that it "could have been" caused, (Tr 129), by the Company. In addition, as the Board noted, (ALJD 12), and VanderMale conceded, (Tr 127), at least one of the four employees who was reimbursed may have had his vehicle parked adjacent to, but not on, company property.

E. The Company Unlawfully Vowed "To Do Everything Possible" to Remain Nonunion

Substantial evidence supports the Board's finding, (D&O 2), that the Company unlawfully declared in its employee handbook the Company's "intention to do everything possible to maintain [its] union-free status," (D&O 2, ALJD 9; Tr 32-33, GCX 2). As the Board found, (D&O 2), that "statement, in the context of

actual unlawful conduct, reasonably conveyed the message that the [Company] would do anything, including unlawful conduct, to maintain its union-free status," (D&O 2), and thus was unlawful, (D&O 2, ALJD 10). See Harpercollins San Francisco v. NLRB, 79 F.3d 1324, 1330 (2d Cir. 1996) (employer's stated intention to oppose unionization "with every weapon at our disposal" was unlawful in context of other actual unfair labor practices); Classic Coach, 319 NLRB 701, 702-703 (1995) (employer's declaration, "I'll do whatever I can to stop [union]," was unlawful in view of other actual violations). Moreover, as the Board found, (ALJD 9-10), that declaration unlawfully indicated to employees that it would be futile to engage in union activity. See NLRB v. Dorothy Shamrock Coal Co., 833 F.2d 1263, 1266 (7th Cir. 1987) (employer's statement, "we're not union, we have never been and never will be, " sent unlawful message that attempts to unionize would not be tolerated).

Once again, the Company erroneously attempts (Br 29, 31) to defend itself on the basis of its alleged intentions. <u>See Carry Companies of Illinois, Inc. v. NLRB</u>, 30 F.3d 922, 934 (7th Cir. 1994) (employer's intent is irrelevant). The Company also errs in claiming (Br 29-30) that it did not orally restate during the organizing campaign its "intention to do everything possible to maintain [its] union-free status." The Company republished that unlawful statement in the February 1995 version of its employee

handbook, (Tr 35, GCX 35), while the Union was still campaigning to maintain support in the event of a second election, and in the midst of the Company's other unlawful conduct.

Further, the Company's reliance (Br 30-33) on Ross Stores, Inc., 329 NLRB No. 59, 163 L.R.R.M. (BNA) 1137 (Sept. 30, 1999), is misplaced. In Ross Stores, as the Company recognizes (Br 31), the Board found that the company president's statement, that "he would do everything in his power to keep the union out," was not unlawful "[i]n the absence of any other threatening language or statements." 163 L.R.R.M. at 1141 (emphasis added). Here, in contrast, the Board specifically found and relied on, (D&O 2), the fact that the Company maintained its vow "to do everything possible" to combat unionization "in the context of actual unlawful conduct," (D&O 2). For the same reason, the Company errs in relying on The Standard Products Co., 281 NLRB 141, 147-148 (1986) (employer's statement, "I will do everything in my power to keep the Union out, " did not, "standing alone, constitute[] an unlawful threat") (emphasis added).

Finally, the Company's reliance (Br 32) on this Court's decision in NLRB v. Village IX, Inc., 723 F.2d 1360 (1983), is misplaced as well. Village IX did not involve an employer's threat "to do everything possible" to remain nonunion, but rather a prediction that the employer would shut down if forced

to pay union wages. In any event, as the Court later emphasized in NLRB v. Harrison Steel Castings Co., 728 F.2d 831, 840 n.18 (1984), the employer's prediction in Village IX was not unlawful because it was based on objective, and unique, circumstances.

F. The Company Unlawfully Failed to Announce a Wage Increase in January 1995, Told Employees in February 1995 that There Would Be No Wage Increase, and Blamed the Union in June 1995 for the Loss of the Wage Increase

Substantial evidence supports the Board's findings, (D&O 1-2, ALJD 9), that the Company violated Section 8(a)(1) of the Act by failing to announce a wage increase in January 1995, telling employees in February 1995 that there would be no increase, and blaming the Union in June 1995 for the loss of the wage increase. Contrary to the Company's contentions (Br 25-26), its failure to announce the wage increase and its statements attributing the absence of the increase to the Union were unlawful because they tended to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. See Fieldcrest Cannon, Inc., 318 NLRB 470, 499 (1995) (employer violated Section 8(a)(1) by telling employee that he was given more work because of the union), enforced in part, 97 F.3d 65 (4th Cir. 1996); Jordan Marsh Stores Corp., 317 NLRB 460, 463 (1995) (employer violated Section 8(a)(1) by telling employees that wage raises would be withheld because of the union).

- II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING TO CONTINUE ITS PRACTICE OF CONDUCTING ANNUAL WAGE SURVEYS AND, BASED THEREON, GRANTING ANNUAL WAGE INCREASES, IN 1995 AND EACH YEAR THEREAFTER, BECAUSE EMPLOYEES VOTED FOR THE UNION
- Α. Applicable Principles and Standard of Review Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) and (1) of the Act by departing from an established practice of granting wage raises because employees have engaged in union activity. See NLRB v. Shelby Memorial Hosp. Ass'n, 1 F.3d 550, 557-558 (7th Cir. 1993) (employer violated Section 8(a)(3) and (1) by withholding annual wage raise because of a union campaign); NLRB v. Don's Olney Foods, Inc., 870 F.2d 1279, 1285 (7th Cir. 1989) (employer violated Section 8(a)(3) and (1) by withholding regular sixmonth wage raise due to organizing drive); L & M Ambulance Corp., 312 NLRB 1153, 1156 (1993); Times Wire & Cable Co., 280 NLRB 19, 27-28 (1986). 7

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As stated, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(3) of the Act therefore results in a "derivative" violation of Section 8(a)(1). See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 698 n.4 (1983).

B. The Company Had an Established Practice of Implementing Necessary Wage Increases Based on Its Annual Wage Review

In determining whether an established practice of granting wage increases exists, the Board considers all the circumstances, including whether the increases are determined by fixed criteria, whether the timing of the increases is similar from year to year, whether the amount of the increases falls within a narrow range, whether a majority of employees receives the increases, and whether the increases have been granted over a significant period of time. See, e.g., Dynatron/Bondo Corp., 323 NLRB 1263, 1263-1264 (1997) (finding regular practice of wage increases where given over six-year period to majority of employees around their anniversary dates, and in a range of 1.5 to 8 percent), enforced, 176 F.3d 1310 (11th Cir. 1999). Board also considers the employer's own statements regarding the character of the wage increases. See, e.g., L & M Ambulance Corp., 312 NLRB 1153, 1153 n.2 (1993) (relying on employer's acknowledgement to employees of its "practice" of granting regular wage increases).

As the Board observed, the Company's adherence to its annual wage review and implementation process in 1989, 1990, 1991, 1992, 1993, and 1994 "fully speaks for itself." (ALJD 8.)

See, e.g., Times Wire & Cable Co., 280 NLRB 19, 19 (1986)

(employer's granting of raises in three successive years

established a practice of giving such increases, such that the failure to give increase because of the union violated Section 8(a)(3) and (1) of the Act). Moreover, the wage increases were based on the Company's wage survey, were granted around the same time each year, and the amount of the increases fell within a narrow range of 5 to 20 cents per hour. (ALJD 7-8; Tr 46-49, 80, GCX 5(a)-(e).) See Dynatron/Bondo Corp., 323 NLRB at 1263-1264. Finally, as the Board emphasized, (ALJD 8), the Company itself, in attempting to dissuade employees from supporting the Union, asserted that its "past and present practice is to conduct the [wage] survey in the Fall, to announce the increase in late December or early January, and to put the increase into effect in February." (ALJD 7-8; GCX 6(c)) (emphasis added).

The Company's arguments (Br 13-16) that the Board erred in finding that it had a practice of granting annual wage increases lack merit. The Company contends (Br 15, 25) that the only established practice was its annual "wage review," and that the granting of increases was "discretionary" (Br 15). There is no merit in this attempt to separate the review from the increase, as the latter was a direct product of the former. (Tr 80.) As the Board found, the Company used a "specific procedure," (ALJD 8), based on objective criteria, to determine what wage raises were necessary "to remain competitive to continue to hire

people," (Tr 762). In such circumstances, the employer's "practice" includes not only the application of the criteria for determining wage increases, but the implementation of the result, as well. Cf. Daily News of Los Angeles v. NLRB, 73 F.3d 406, 412-413 (D.C. Cir. 1996) (when criteria for determining "discretionary" wage increases are fixed, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally failing to continue to apply those criteria and abide by the results). And here, of course, the Company actually conducted its wage review in late 1994, (ALJD 7; Tr 53-54, 762, GCX 6(b)), and has never claimed that the review dictated that no increase was necessary.

For similar reasons, the Company's reliance (Br 14) on the fact that there was no across-the-board wage increase in 1991 is misplaced. As the Board found, (ALJD 7; Tr 51-52), the Company actually engaged in its regular review process in 1991, but simply concluded "that the conditions did not warrant a wage increase," (ALJD 7; Tr 51-52). That being the case, the absence of an increase in 1991 is consistent with the Board's finding, (ALJD 8-9), that the Company had a practice of reviewing its wage structure each year and implementing necessary increases. Indeed, it only confirms that the Company actually abided by the results of its annual wage review.

The Company also errs in relying (Br 15) on evidence that the amount of the annual across-the-board wage increase fluctuated between 5 and 20 cents per hour. Cf. NLRB v. Don's Olney Foods, Inc., 870 F.2d 1279, 1285 (7th Cir. 1989) (where employer gave merit increases every six months, fact that increases expected to range from zero to 50 cents per hour, or that amount of raises had not yet been determined, did not undercut Board's finding of an established practice of granting such raises); Borman's, Inc., 296 NLRB 245, 248 (1989) (in finding an established policy of annual salary reviews and increases to support finding of Section 8(a)(3) and (1) violation, it "is not significant" that the specific amounts of increases varied); Times Wire & Cable Co., 280 NLRB 19, 27-28 (1986) (finding a practice of annual wage increases sufficient to support finding of Section 8(a)(3) and (1) violation, notwithstanding fact that amount of increase was undetermined).

The Company's reliance (Br 15-16) on the Ninth Circuit's decision in Free-Flow Packaging Corp. v. NLRB, 566 F.2d 1124 (1978), is misplaced, as well. As the Company recognizes, the Ninth Circuit refused to enforce the Board's finding in Free-Flow Packaging that the employer unlawfully withheld a wage increase because, unlike here, "the status quo was not so clearly apparent." 566 F.2d at 1130. The employer had raised wages in only two years, they were not general or across-the-

board increases, and the employer had consistently denied assuring employees of annual increases. In the instant case, as shown, prior to the union campaign, the Company conducted its annual wage review in at least six consecutive years, actually granted across-the-board increases in five of those years, and advertised this "practice" in its antiunion campaign.

C. The Company's Failure to Continue Its Practice of Conducting Annual Wage Surveys and, Based Thereon, of Granting Annual Wage Increases in 1995 and Each Year Thereafter Was Motivated by Its Employees' Vote for the Union

As the Board observed, in late 1994 the Company confirmed the existence of its wage practice to employees, and "reasonably led employees to believe that they would receive a wage increase in 1995 consistent with the past practice." (ALJD 9.) As the Board concluded, (ALJD 9), the only credible explanation for the Company's "sudden decision" to end this practice following the representation election was its employees' vote for the Union.

Indeed, as the Board found, in a series of statements to employees, some of which, as discussed above, were themselves unlawful, the Company openly admitted its motivation. (D&O 2, ALJD 9, 20.) Thus, in a February 6 leaflet to employees, the Company unlawfully stated to employees that there was no wage increase because of the union election. (ALJD 8; GCX 9.) Then, in a March 1995 leaflet, "the [Company] expressly blamed the Union for 'the mess,' a not too subtle reference to the

employees' failure to receive a wage increase in February," (D&O 2), and in June 1995, in another unlawful statement, "explicitly blamed the Union ('the UE stuck its nose in') for the failure to grant the wage increase." (D&O 2.) See NLRB v. Globe Products

Corp., 322 F.2d 694, 696 (4th Cir. 1963) (employer's statement to employees that they were being discharged because employer did not like them "fooling around with the union" virtually eliminated any dispute over employer's antiunion motivation).

Moreover, as discussed above, the Company's February and June statements independently violated Section 8(a)(1) of the Act and, as such, further confirm its unlawful motive. See Van Vlerah Mechanical, Inc. v. NLRB, 130 F.3d 1258, 1264 (7th Cir. 1997) (contemporaneous Section 8(a)(1) violations support an inference of unlawful motive under Section 8(a)(3)). Accord Power, Inc. v. NLRB, 40 F.3d 409, 418 (D.C. Cir. 1994) (unlawful threat of plant closure supported inference of animus in connection with later discharges).

As the Board explained, the Company's contention (Br 16-20), that it was unfairly caught between "a rock and a hard place," and that it did what "it believed was appropriate," (Br 18), lacks merit because "'neither [granting nor withholding a wage increase] has been declared illegal per se. It becomes so only if the employer is found to be manipulating benefits in order to influence his employees' decision during the union

organizing campaign.'" (D&O 2) (quoting NLRB v. Otis Hospital, 545 F.2d 252, 255 (1st Cir. 1976)). And as shown above, this is exactly what the Company did by failing in 1995 and in each year thereafter to implement whatever annual wage increase was necessary, and expressly blaming the Union for the loss of such increases. See NLRB v. Don's Olney Foods, Inc., 870 F.2d 1279, 1285 (7th Cir. 1989) (employer must prove a "union-neutral" justification).

The Company responds that "[t]here is not a hint" (Br 19) in its February 6, 1995 leaflet, entitled, "The Union asks, 'Where's our raise?'" (GCX 9), that the Company attributed the loss of across-the-board wage increases to the Union. Although the Company did not expressly blame the Union in that leaflet for the absence of the wage increase, as discussed above, the Company unlawfully attributed the delay to the union election. Moreover, this statement was made in the context of other statements in which, as shown above, "the [Company] unambiguously attributed to the Union the responsibility for the absence of the wage increase." (D&O 2; GCX 11.)

Contrary to the Company's assertion (Br 19), the Fifth Circuit's decision in Marshall Durbin Poultry Co. v. NLRB, 39 F.3d 1312 (1994), is inapposite. In Marshall Durbin Poultry, the court disagreed with the Board's finding that the employer unlawfully delayed a wage increase and blamed the union, because

the Board failed to find that the employer's "pattern of wage increases was not haphazard," 39 F.3d at 1323 n.24; the company vice-president's statement, that he hoped employees would give the union "hell" for the absence of the wage increase, was never communicated to employees, <u>id.</u>; the only other statement blaming the union was made by a low-level supervisor who had no authority or control over wages, <u>id.</u>; and the single notice posted by the employer cited <u>only</u> the employer's desire to avoid the appearance of interference with the election as the reason for the delay in the wage increase.

Here, in contrast, the Board specifically found that the Company's practice of annually reviewing wages and granting increases "was not haphazard or amorphous." (ALJD 8-9.)

Moreover, the Company's repeated message to employees that the Union was responsible for "all the mess," (D&O 1; GCX 10), regarding wages was communicated by the Company's highest-ranking managers and supervisors, including Director of Labor Relations VanderMale. Finally, as discussed above, the Company's communications to its employees clearly were not limited to a statement of its desire to avoid the appearance of interference with employees' free choice.

The Company's argument (Br 20-22), that it had a legitimate business reason for discontinuing the annual wage increases, lacks merit, as well. The Company contends (Br 20-22) that its

failure to grant an across-the-board wage increase in 1995 was simply a product of its broader decision to abandon such "obsolete" raises in favor of a training-and-development-based wage program. Based on contrary record evidence, however, the Board, (ALJD 9), specifically rejected this claim.

As the Board explained, "[t]he training and development and merit increases had coexisted with the annual increase; they were not designed to supplant it." (ALJD 9; Tr 62-63, 758-761.) Indeed, each program served a different purpose. (ALJD 9; Tr 758-761.) Further, as the Board pointed out, (ALJD 9; Tr 73-75), the Company's claim that it had decided to end its practice of giving annual across-the-board wage raises is undermined by the fact that it never mentioned this decision or asserted the alleged obsolescence of such increases in its explanations to employees for the loss of the 1995 increase. In those circumstances, it was entirely reasonable for the Board to conclude "that this argument [was] an afterthought created for trial." (ALJD 9.)

That conclusion was not reached "arbitrarily," as the Company contends (Br 23). As the foregoing account of the Board's analysis makes clear, the Board sufficiently explained its reasons, (ALJD 9), for discrediting testimony at the hearing by company witnesses, (Tr 74-75, 763-764, 767), that across-the-board wage increases were ultimately deemed obsolete and

abandoned in favor of a training-and-development-based wage program. Further, the additional "evidence" the Company claims the Board ignored does not support its position. As an example, the Company's January 9, 1995, internal memorandum (Br 23 n.6) makes no mention of a company decision that across-the-board wage increases had become obsolete and should be abandoned.

Accordingly, the Company's contentions lack merit and, thus, only serve to further bolster the Board's finding of an illegal motive. See Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (the falsity of an alleged justification for adverse action supports an inference of unlawful motive).

- III. THE BOARD ACTED REASONABLY WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING THE COMPANY TO MAKE EMPLOYEES WHOLE FOR ANNUAL WAGE INCREASES THEY WOULD HAVE RECEIVED IN 1995 AND EACH YEAR THEREAFTER
- A. Applicable Principles and Standard of Review
 The Board's remedial authority under Section 10(c) of the
 Act (29 U.S.C. § 160(c)) includes requiring offending parties
 "to take such affirmative action . . . as will effectuate the
 policies of [the Act]." So long as the Board's order is in
 furtherance of those policies, "the Board has wide discretion in
 requiring an employer to take whatever affirmative action it
 deems necessary to cure an unfair labor practice." G. Heileman
 Brewing Co. v. NLRB, 879 F.2d 1526, 1534 (7th Cir. 1989). Thus,

a Board remedial order warrants enforcement, "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." <u>Virginia Electric & Power Co. v. NLRB</u>, 319 U.S. 533, 540 (1943). <u>Accord NLRB v. Manitowoc Eng'g Co.</u>, 909 F.2d 963, 972-973 (7th Cir. 1990).

B. The Board's Remedial Order Was Reasonable

The Company asserts (Br 26-28) that the Board exceeded its remedial authority in ordering the Company to "make employees whole for the wage increases they would have received in 1995 and each year thereafter but for [the Company's] unlawful conduct." (ALJD 20.) On the contrary, the Board's remedy is reasonably tailored to curing the Company's unlawful conduct.

The Company's argument (Br 26-28) assumes that the Board found that the Company committed only one discrete violation of Section 8(a)(3) and (1) of the Act; that is, withholding the annual wage increase in 1995. But, in fact, the Board reasonably found a continuing violation, which, as we have shown, was based on the Company's abandoning a well-established practice in retaliation for its employees union activity. Thus, the Board concluded that, "[b]y failing to continue its practice of conducting annual wage surveys and based thereon, granting annual wage increases in 1995 to date, because employees voted in favor of the Union, [the Company] violated Section 8(a)(3)

and (1) of the Act." (ALJD 20.) Requiring the Company to "make employees whole for the wage increases they would have received in 1995 and each year thereafter" reasonably addresses that violation. (ALJD 20.)

The Company's further argument (Br 27), that the complaint did not specifically challenge the Company's failure to implement wage increases in the years after 1995, should be rejected, as well. To begin, the Court should not consider this argument because the Company did not except to the administrative law judge's recommended remedy on this ground.

29 U.S.C. § 10(e); Woelke & Romero Framing, Inc. v. NLRB, 456

U.S. 645, 665 (1982) (reviewing court lacks jurisdiction to hear arguments and objections not urged before the Board). The Company's Exception 1, which states, "The wage remedy ordered by the ALJ is not rationally supported by the evidence,"

(Respondent's Exceptions), mentions neither the scope of the complaint nor the Company's claim (Br 27) that it was denied notice of the General Counsel's allegations. That is

insufficient to satisfy the requirements of Sections 102.46(b)(1) of the Board's Rules and Regulations.⁸

In any event, the parties actually litigated the Company's discontinuation of its <u>practice</u>, not just the 1995 wage increase. (Tr 73-75, 767.) See NLRB v. Complas Indus., Inc., 714 F.2d 729, 734 (7th Cir. 1983) (per curiam) (even if an alleged unfair labor practice is not pleaded, the Board may find a violation if the matter was fully litigated). Indeed, the Company's defense that it had changed its practice, (Tr 73-75), shows that it understood that the General Counsel was litigating the annual wage increases as an ongoing practice. Cf. NLRB v. Western Temporary Services, Inc., 821 F.2d 1258, 1265 (7th Cir. 1987) (no violation of due process where party attended hearing and presented its arguments and evidence on an issue).

*Section 102.46(b)(1) provides, in pertinent part, "[e]ach exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception."

The Company did assert its "notice" argument in its separate Respondent's Brief in Support of Exceptions. However, under Section 102.45(b) of the Board's Rules and Regulations, the Company's supporting brief is not part of the record before this Court.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment enforcing the Board's order in full.

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